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No. 07-1385

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In The

Supreme Court of the United States

CYNTHIA MARIE LONG, individually, and as Personal Representative of the Estate of Dustan Dominic Long Decedent,

Petitioner,

v.

CITY AND COUNTY OF HONOLULU; PATRICK A. STERLING, Officer, Honolulu Police Department; JOHN DOES 1-10,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeals correctly applied established precedent in affirming summary judgment in favor of the Respondent officer on the basis that the officer's use of deadly force met the objective reasonableness standard for qualified immunity.

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STATEMENT OF THE CASE

In this action for relief under 42 U.S.C. § 1983, Petitioner seeks to rewrite established Supreme Court and Ninth Circuit precedent on qualified immunity and summary judgment principles by claiming that immaterial factual disputes based upon speculative inferences should have precluded summary judgment in Respondents' favor. Petitioner's attempt to solicit this Court's review by reciting the mantra of "credibility issues" falls far short of the "compelling reasons" set forth in Rule 10 of the *Rules of the Supreme Court of the United States* for the exercise of this Court's jurisdiction.

Contrary to Petitioner's assertions, the Ninth Circuit, consistent with this Court's holding in *Brosseau v. Haugen*, 543 U.S. 194, 195 n.2, 197, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004), viewed material facts in the light most favorable to Petitioner, and drew all reasonable inferences in Petitioner's favor. Under this standard, and applying the principles established in *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), and *Scott v. Henrich*, 39 F.3d 912 (9th Cir. 1994), the Ninth Circuit found that Respondents' use of force was objectively reasonable under the circumstances, and that the district court's grant of summary judgment on qualified immunity principles was proper. Petitioner's mere dissatisfaction with the Ninth Circuit's factual findings and application of law simply does

not warrant this Court's attention, and the petition for writ of certiorari should be denied.

STATEMENT OF FACTS

On June 3, 2001, Dustan Long (hereinafter "Long") was holding a party at his home in Wahiawa, Hawaii. At about 2:00 a.m., a group of uninvited people arrived and were involved in an altercation. Long fired a .22 caliber rifle into the air and shouted for everyone to leave. The group of uninvited people then began to beat up Long's friend, and Long fired shots to stop the fight. As this group got into a car to leave, Long fired several more shots in their direction, injuring two of the passengers, who then called the police.

The Honolulu Police Department's Specialized Services Division (hereinafter "SSD") was called to the scene. The police told Long to surrender, but he instead barricaded himself in the house. Officer Patrick Sterling ("Officer Sterling") was a counter-sniper with SSD, and was one of the officers who reported to the Long residence. He was positioned on a rooftop across the street, while other SSD officers were positioned at the entrance to the driveway of the Long residence.

Long walked around the property throughout the night, holding the .22 caliber rifle as he shouted various threats at the police. Long yelled at the police that they had ten seconds to get the "f--- out of his

yard," and began counting down from ten. A shot was then fired from inside the house.

Sometime later, Long was later heard making comments like, "Bring it on, let's see it." Long threatened to shoot out the police lights if they did not turn them off. He also demanded that the police leave and turn off their lights or he would shoot them in the face.

SSD Officers Keith Marini and Michael Cannella were attempting to set up a perimeter around the Long property. Officers Marini and Cannella were positioning themselves closer to the house, behind a large bamboo hedge at the side of the house. Long was walking back and forth between the carport and garage just on the other side of the hedge where officers Marini and Cannella were located. Officers Marini and Cannella reported over the radio that they jumped into a ditch for cover because Long was shouting threats. Long shouted to the officers, "I told you f---er's get the f--- back," and "Have some of this." The officers then reported over the radio, "Shots fired. He just shoot [sic] at us."

Officer Sterling fatally shot Long with a single bullet fired within a couple of seconds after hearing Officer Marini's communication that shots were fired. According to Officer Sterling, he saw Long raise his rifle to about chest level and fire one shot. However, no shell casing was recovered from this alleged shot. The Ninth Circuit therefore assumed on appeal that no shot was actually fired by Long at that time. When

the police finally entered the property, Long was found dead, lying next to a rifle.

Petitioner subsequently filed the present action against Officer Sterling and the City and County of Honolulu, seeking damages, *inter alia*, under 42 U.S.C. § 1983 for use of excessive force against Long. Respondents moved for summary judgment on the grounds that Officer Sterling was entitled to qualified immunity, and there was no evidence to support municipal liability. The motion was denied without prejudice to allow for more discovery.

Respondents thereafter renewed their motion for summary judgment. The district court granted the motion, holding that there was no constitutional violation and no basis for municipal liability. The opinion of the United States District Court for the District of Hawaii is found at *Long v. City and County of Honolulu*, 378 F.Supp.2d 1241 (D.Haw. 2005). (Petitioner's ["Pet."] Brief, at Appendix ["App."] 14-31).

Final judgment was entered in favor of Respondent, and Petitioner appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit denied the appeal and affirmed, at *Long v. City and County of Honolulu*, 511 F.3d 901 (9th Cir. 2007). (Pet. Brief, at App. 1-13).

Petitioner's petition for rehearing and suggestion for rehearing *en banc*, which raised the very same

issues and arguments presented to this Court, was denied on February 5, 2008. (Pet. Brief, at App. 32).

REASONS FOR DENYING THE PETITION

A. The "Question Presented" By Petitioner Does Not Apply to This Action.

Petitioner is attempting to frame her "Question Presented" as one requiring this Court's review by claiming that this case involves a decision by the Ninth Circuit which is in direct conflict with this Court's precedent regarding summary judgment law. However, the essence of Petitioner's argument, and the true question presented in this case, is Petitioner's disagreement with the Ninth Circuit's factual findings and application of the rule on summary judgment. Accordingly, under Rule 10 of the *Rules of the Supreme Court of the United States*, the instant petition does not involve any "compelling reasons" that would warrant this Court's review.

Petitioner argues that where there are credibility issues, summary judgment should be denied and the case be allowed to proceed to trial. (Pet. Brief, at 9-10). Petitioner cites to alleged discrepancies in reports of the incident (Pet. Brief at 5-8), and argues that these inconsistencies raised questions of fact that should have precluded summary judgment had the Ninth Circuit properly applied established summary judgment principles.

Contrary to Petitioner's assertions, however, the Ninth Circuit correctly applied the summary judgment standard by resolving factual disputes in favor of Petitioner, and still found that Officer Sterling's use of force was objectively reasonable under the circumstances. The Ninth Circuit was well aware of its own admonition to "be wary of self serving accounts by police officers when the only non-police eyewitness is dead," (Pet. Brief, at App. 8 [citing *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994)]), but noted that unlike the situation in *Scott*, there were other reports and evidence of the officers' actions. *Id.*

Moreover, the Ninth Circuit specifically rejected Petitioner's argument that discrepancies in the accounts of the incident gave rise to factual disputes which should preclude summary judgment. The court stated that Petitioner's "claims of factual error in the police accounts do not change our analysis." (Pet. Brief, at App. 8). Rather, the Ninth Circuit found that such discrepancies were immaterial, and therefore did not create genuine issues of material fact. *Id.* The Ninth Circuit's decision was therefore consistent with this Court's precedent on summary judgment law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 1505, 91 L.Ed.2d 202 (1986) ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted") (citation omitted).

As seen, Petitioner's primary contention here is that the Ninth Circuit overlooked credibility issues that should have precluded summary judgment. The petition does not involve any conflict with this Court's precedent regarding summary judgment, or for that matter, qualified immunity. The instant petition therefore should be denied.

B. The Ninth Circuit Properly Applied Precedent in Affirming Summary Judgment in Favor of Officer Sterling on the Basis That the Officer's Use of Deadly Force Met the Objective Standard for Qualified Immunity.

The Ninth Circuit, in holding that Officer Sterling's use of deadly force was objectively reasonable, properly applied established law on qualified immunity. It analyzed Petitioner's claim of deadly force under the Fourth Amendment's reasonableness standard, in accordance with *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) and *Tennessee v. Garner*, 471 U.S. 1, 7, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985).

Consistent with Supreme Court and Ninth Circuit precedent, the court noted that an officer's use of deadly force is "reasonable only if the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Scott v. Henrich*, 39 F.3d 912, 914 (9th Cir. 1994) (quoting *Garner*, 471 U.S. at 3, 105 S.Ct. 1694). Moreover, the Ninth Circuit analyzed

Officer Sterling's claim of qualified immunity in accordance with the following:

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.

Graham, 490 U.S. at 396, 109 S.Ct. at 1872, 104 L.E.2d 443 (quoted in *Henrich*, 39 F.3d at 914).

In addition, the Ninth Circuit also viewed facts in the light most favorable to Petitioner, and drew every reasonable inference in Petitioner's favor. Accordingly, given the factual dispute about whether Long fired at Officers Marini and Cannella immediately before he was shot by Officer Sterling, the court assumed that no shot was actually fired by Long. (Pet. Brief, at App. 4).

In fact, the Ninth Circuit specifically stated that whether Long actually fired at Officers Marini and Cannella was "immaterial," as it was "enough that Sterling heard the radio transmission and observed Long point the rifle in the officers' direction." (Pet. Brief, at App. 8). In this regard, the Ninth Circuit's decision was consistent with this Court's instruction

in *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), in which this Court stated:

> An officer might correctly perceive all of the relevant facts but have a mistaken belief as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.

Saucier, 533 U.S. at 205, 121 S.Ct. at 2158, 150 L.Ed.2d 272.

The Ninth Circuit's recognition that Officer Sterling's actions were objectively reasonable even assuming Long had not fired a shot toward Officers Marini and Canella is entirely consistent with established caselaw on qualified immunity. As this Court has held previously:

> The qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.' . . . This accommodation for reasonable error exists because 'officials should not err always on the side of caution' because they fear being sued.

Hunter v. Bryant, 502 U.S. 224, 229, 112 S.Ct. 534, 537, 116 L.Ed.2d 589 (1991) (citations omitted).

Even under Petitioner's version of events, the Ninth Circuit found that the following undisputed material facts supported a finding that Officer

Sterling's actions were objectively reasonable under the circumstances:

> 1. Officer Sterling had observed Long's agitated behavior;
>
> 2. Officer Sterling had heard Long threaten to shoot the police;
>
> 3. Officer Sterling had observed Long carrying a .22 caliber rifle and walking about his property;
>
> 4. Officer Sterling knew that Long had previously shot at a car full of people and wounded two people therein earlier that night;
>
> 5. Officer Sterling heard Officers Marini and Cannella radio that Long was yelling threats at them; and
>
> 6. Officer Sterling heard Officer Marini over the radio that Long was shooting at them.

(Pet. Brief, at App. 8).

The Ninth Circuit properly observed that under these circumstances, Officer Sterling had "probable cause to believe that Long posed an immediate danger to these officers." (Pet. Brief, at App. 8). With the foregoing, and applying established qualified immunity principles, the court concluded, "In the exigent circumstances of that night, Sterling acted in an objectively reasonable manner." (Pet. Brief, at App. 8).

As the Ninth Circuit correctly acknowledged, Officer Sterling did not have to be correct in his perception that Long had aimed and fired his rifle at Officers Marini and Cannella. Even if Officer Sterling's belief that Long had fired a shot at Officer Marini was mistaken, qualified immunity only requires that Officer Sterling's belief be objectively reasonable regarding the amount of force he believed was necessary under the exigent circumstances of that early morning. "[Q]ualified immunity can apply in the event the mistaken belief was reasonable." *Saucier*, 533 U.S. at 206, 121 S.Ct. at 2159, 150 L.Ed.2d 272.

Thus, the Ninth Circuit properly analyzed Petitioner's claim of deadly force, and Officer Sterling's claim of qualified immunity, consistent with Supreme Court and Ninth Circuit precedent. Contrary to Petitioner's contention, the Ninth Circuit's decision does not conflict with Supreme Court precedent. Rather, the Ninth Circuit correctly drew inferences in Petitioner's favor where appropriate, reviewed the incident from the perspective of a reasonable officer at the scene facing the exigent circumstances of that night, and found no genuine issues of **material** fact to preclude summary judgment in Respondents' favor. Petitioner's mere disagreement with the Ninth Circuit's decision does not justify invoking the jurisdiction of this Court. There are no compelling reasons warranting this Court's review, and the Petition for Writ of Certiorari should therefore be denied.

CONCLUSION

Based on the foregoing, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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